In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-656

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S LOCAL 50, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

1. The Board found that International Longshoremen's and Warehousemen's Union, Local No. 50 ("Longshoremen") violated Section 8(b)(4)(D) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(D), by engaging in, and threatening, work stoppages for an object of forcing Brady-Hamilton Stevedore Company ("Brady") and W. J. Jones & Son, Inc. ("Jones") (collectively, "the Companies")

to assign certain work [1] to employees represented by Longshoremen rather than to employees represented by petitioner, Hoisting and Portable Engineers, Local No. 701, International Union of Operating Engineers, AFL-CIO ("Engineers"). 193 NLRB 266.[2] In an earlier proceeding, conducted pursuant to Section 10(k) of the Act, 29 U.S.C. 160(k), the Board had determined that employees represented by the Engineers, rather than those represented by the Longshoremen, were entitled to perform the disputed work (Pet. App. 25a, 37a-38a).

In awarding the work to employees represented by the Engineers, the Board considered and gave substantial weight to the facts that the prevailing practice on the West Coast was to assign such work to operating engineers; that, prior to the application of economic sanctions against them, the Companies had uniformly assigned this work to operating engineers; and that operating engineers, being more experienced and proficient, were better qualified to perform the work and could do so more economically and safely (Pet. App. 31a-37a). The Board rejected the contention that collective bargaining contracts supported the Longshoremen's claim to the work, stating (Pet. App. 33a-34a):

> Recent PMA-Longshoremen contracts provide that "All machinery, equipment and other tools now or

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[1] The operation of "barge-mounted floating whirly-type cranes lifting bundles of logs from the water and placing them into the holds of ships and barges at Employers' Astoria, Oregon, operations" (Pet. App. 37a-38a).

[2] This decision, which is omitted from the petition, is set forth as an appendix to the Brief in Opposition for Pacific Maritime Association, *et al.*, pp. 4-37.

hereafter used in moving cargo shall be operated by longshoremen when used in an operation covered by this Agreement and the operation thereof is assigned to longshoremen and is covered by this Agreement," with certain exceptions. One of the exceptions specified is the operation of cranes mounted on floating crane barges.* * *

On the other hand, the labor agreement between the Engineers and Willamette and General [3] includes under Article II, "Work Affected Defined," the following language:

> * * * including operation, maintenance, and repair of land and floating plant equipment, vehicles and other facilities used in connection with the described work and services, and all other work of similar nature.

2. The court of appeals sustained the Board's findings that an outstanding Longshoremen's certification did not support an award of the crane work to longshoremen; that at the time of the work stoppage the operating engineers were more skilled, efficient, and safe crane operators than were the longshoremen; and that past practice and the Longshoremen's acquiescence in the assignment of the crane work to operating engineers (until the strike here) supported a work award to the Engineers (Pet. App. 6a-7a). The court, however, held that the Board improperly found that the

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[3] Brady and Jones leased waterborne whirly cranes from Willamette Western Corporation and General Construction Company. Prior to the Longshoremen's strike pressure, these cranes were leased complete with operator and fireman, all of whom were members of the Engineers (Pet. App. 26a).

PMA-Longshoremen collective bargaining contract—to which Brady and Jones were bound—did not cover the disputed work. The court pointed out that, on May 8, 1969, after the work stoppage, an arbitrator had ruled that the contract did assign the work of operating floating cranes in Astoria to the Longshoremen (Pet. App. 7a). The fact that the Engineers was not a party to the arbitration did not, in the court's view, justify the Board in ignoring the ruling. For the "purpose of the arbitration was to decide upon the meaning of the agreement, and therefore the only logical or necessary parties to the arbitration were the parties bound by it, the Longshoremen and the PMA, acting for Brady and Jones" (Pet. App. 8a-9a).

Concluding that "the Board's erroneous finding or conclusion about the applicability of the PMA-Longshoremen contract" (Pet. App. 11a) may have led to "a misplaced emphasis on the factors of skill, efficiency and safety" and to an ignoring of "the efforts of labor and management to provide for a peaceful and stable method of resolving labor crises caused by technological advancement" (Pet. App. 10a), the court remanded the case to the Board for reconsideration of its 10(k) decision. In so doing, the court stated (Pet. App. 18a-19a):

> The Board's work award to the Engineers conflicts with two of the factors that the Board often relies upon. It is possible, of course, that the Board may think that the Engineers should get the work despite the PMA-Longshoremen contract and the employers' preference. On the other hand, the Board may determine that in light of the correct interpretation of the

contract, the factors of skill, efficiency, safety, acquiescence and past practice are not controlling. Our reversal of the Board's conclusion as to the applicability of the contract precludes us from sustaining the Board's work assignment in this case. The Board must be given the first opportunity to use its accumulated expertise and make a principled rather than an arbitrary award of the work in light of the correct construction of the contract.

3. The petition raises two basic questions: (a) whether the court of appeals exceeded its reviewing authority by requiring the Board, in determining a jurisdictional dispute under Section 10(k) of the Act, to give greater weight to the factors of employer preference and contract coverage than to other factors (Pet. 28-39); and (b) whether the court of appeals' action in requiring the Board to give effect to the PMA-Longshoremen arbitration award, though the Engineers were not a party to the arbitration, is contrary to *National Labor Relations Board* v. *Plasterers' Union,* 404 U.S. 116 (Pet. 46-50). Although the Board did not petition for a writ of certiorari in this case, it is of the view that these issues were decided incorrectly by the court of appeals and is prepared to support the petitioner on

the merits should this Court grant certiorari. Accordingly, the Board does not oppose the granting of the Engineers' petition.

Respectfully submitted.

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